NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IRONE WATFORD,	:	
	:	Civil Action No. 04-1388 (SDW)
Petitioner,	:	
	:	
v.	:	**OPINION**
	:	
ROY L. HENDRICKS, et al.,	:	
	:	
Respondents.	:	

APPEARANCES:

Petitioner pro se
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WIGENTON, District Judge

Petitioner Irone Watford, a prisoner currently confined at New Jersey State Prison in Trenton, New Jersey, has submitted a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The respondents are Administrator Roy L. Hendricks and the Attorney General of the State of New Jersey.

For the reasons stated herein, the Petition must be denied.

I. BACKGROUND

A. Factual Background

The relevant facts are set forth in the opinion of the Superior Court of New Jersey, Appellate Division.[1]

> ... Defendant's convictions arose out of his knife-point abduction and brutal rape of the victim, M.S., the mother of three children, during the early morning hours of November 4, 1993, in Jersey City. On that night, M.S. had parked in the garage of her apartment building at approximately 3:00 a.m. As she was locking her car, defendant "came with a knife right on her throat." He pushed M.S. down onto the floor of the passenger side of the car and said to her, "stay and don't move." He then hit M.S. "on her lips."
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> Before she was hit, she saw defendant's face. She described defendant as a black man with a small mustache. He was wearing a red nylon t-shirt, baggy pants, sneakers, a black "nylon wrap" or cap around his head and black wool gloves. Although defendant wore the cap throughout the attack, she was able to see his face. M.S. estimated that the knife blade was three to four inches long.
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> After pushing M.S. to the floor of the car, defendant got into the driver's seat and drove to a remote area that M.S. did not recognize. The trip took about thirty minutes. During the drive, defendant asked M.S. if she had any money or jewelry. M.S. told defendant she did not. At the time, however, she was wearing her wedding ring. She took her ring off and hit it in her mouth. Defendant told M.S. to put the pillow that she kept in the car over her head.

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[1] Pursuant to 28 U.S.C. § 2254(e)(1), "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

When they reached the remote area, defendant told M.S. to take off her clothes and get in the back seat of the car. She complied because she could see defendant holding the knife.

Defendant also got in the back seat of the car where he sexually assaulted her orally, anally and vaginally. Thereafter, defendant drove M.S. to a second location where again he sexually assaulted her. During the assault, defendant removed sufficient clothing for M.S. to recognize that defendant had a tattoo with writing on his right arm. She was not able to read the writing.

After the second assault, defendant told M.S. to put her clothes back on. He also put his clothes back on and returned to the front seat. At approximately 6:00 a.m., defendant drove to Storms Avenue where M.S. exited the car. While standing outside the car, M.S. asked for her apartment keys. Defendant separated the apartment keys from the car keys and gave them to her. During this time, M.S. was again able to see defendant's face. Defendant told M.S. not to call the police because if she did, he would kill her. Before she left, M.S. also retrieved the car registration and insurance card. Defendant drove away and left M.S. on Storms Avenue.

M.S. was observed by a resident of Storms Avenue, who came to her assistance and called the police. The police arrived and took M.S. to the hospital and began their investigation.

During a taped statement, M.S. described her assailant as being a dark-skinned black male in his mid-to-late twenties, about 170 to 175 pounds with a medium build, wearing a black nylon-type [cloth] tied around his head, which covered his hair, a red nylon t-shirt, baggy multicolored balloon-type pants, a blue knee-length coat, black wool gloves and white sneakers. He carried a foot-long, kitchen-type knife, with a wooden handle and a curved blade. She said he did not mention his name or have an accent, nor did he have any outstanding facial features, thought he did have a flat-type of nose. Asked whether she thought she would be able to identify the man, M.S. answered, "Yes definitely." M.S. also said that he had a tattoo with

writing on his right arm, but that she could not read the writing very well.

Later that day, M.S.'s car was spotted by police parked on Armstrong Avenue. The police set up surveillance on the car, and at 9:00 p.m., the police saw defendant approach M.S.'s car. He looked all around and then began looking in the windows of the car. At one point, defendant moved his hand as if he were going to open the car door, but did not. He then walked down the street where he was stopped by police. Defendant agreed to accompany police to the station to talk to them about a kidnaping and a sexual assault. M.S. was also transported to the police station where she identified defendant as her assailant. She also identified defendant's red short sleeve shirt and the tattoo on defendant's right arm. On his right arm were the words "cool rock ski."

The police thereafter searched defendant's residence for the clothing described by M.S. They retrieved a pair of white sneakers, a blue winter jacket, a pair of multicolored balloon pants, a head rag, a pair of black winter-type gloves, white underwear and a brown-handled knife. M.S. identified the blue jacket, the gloves, and the head rag as items defendant wore on the night in question. The baggy pants were not the same pair, but were similar to the pants worn by defendant during the attack. M.S. said the knife was also a different knife. Subsequently, when defendant's blue jacket was examined by police experts for fibers, M.S.'s car keys were found in the jacket pocket. The police also vacuumed M.S.'s car for evidence.

A State forensic expert testified that from the blue sweat pants worn by M.S. on the night of the assault, the pillow retrieved from the rear seat of M.S.'s car, and the vacuumings from the car, she positively identified fourteen black acrylic fibers that compared to the acrylic fibers present in defendant's gloves. The expert opined within a reasonable degree of scientific certainty that the fibers retrieved came from defendant's gloves. Although the gloves had been described as wool gloves, looking at the gloves under a microscope the expert could immediately tell that they were in fact acrylic. From defendant's black head rag and his white sneakers,

> the expert identified two blue Olefin fibers and she opined within a reasonable degree of scientific certainty that these fibers came from the carpeting in M.S.'s car. From white boxer shorts and the long thermal underwear worn by defendant at the time of his arrest, and from defendant's blue jacket, the expert identified eight blue acrylic fibers that compared to acrylic fibers found in vacuumings from M.S.'s car, but the expert did not know the source of this blue acrylic. It was not the same acrylic as the carpeting fiber.
>
> The expert noted that the fibers that were found were all mass produced, so alone these comparisons could only show that defendant and M.S. may have had contact. Nevertheless, the expert's identification of three different fiber types and three different colors that each compared favorably, was a strong indication that defendant and M.S. had contact with each other and also with the car, and that the time between that contact and the collection of the evidence had been relatively recent. When told to assume that the clothing was recovered ab out nineteen hours after the assault, the expert opined that this gave additional strength to her conclusions, because over time, as clothes are worn and removed, some fibers that had been transferred would be lost.

(RE10, Opinion of Superior Court, Appellate Division, at 2-7.)

B. Procedural History

Following a jury trial in the Superior Court of New Jersey, Law Division, Hudson County, Petitioner was convicted of armed robbery, N.J.S.A. 2C:15-1, second-degree robbery, N.J.S.A. 2C:15-1, first-degree carjacking, N.J.S.A. 2C:15-2, first-degree kidnapping, N.J.S.A. 2C:13-1(b), first-degree aggravated sexual assault during a robbery and/or kidnapping, N.J.S.A. 2C:14-2(a)(3), first-degree aggravated sexual assault while armed, N.J.S.A. 2C:14-2(a)(4), second-degree sexual assault, N.J.S.A.

2C:14-2(c)(1), fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b), possession of a knife for an unlawful purpose, N.J.S.A. 2C:39-4(d), and unlawful possession of a knife, N.J.S.A. 2C:39-5(d). Petitioner's aggregate sentence was a term of life imprisonment plus eighty years with a sixty-year period of parole ineligibility.

On March 31, 2000, the Superior Court of New Jersey, Appellate Division, affirmed the conviction and sentence. (RE10.) On July 7, 2000, the Supreme Court of New Jersey denied certification. (RE7.)

Thereafter, Petitioner filed a state petition for post-conviction relief. Following briefing and oral argument, the trial court denied relief without holding an evidentiary hearing. (RE6 at 54a.) On June 16, 2003, the Superior Court, Appellate Division, affirmed the denial of post-conviction relief. (RE4.) On October 29, 2003, the Supreme Court of New Jersey denied certification. (RE1.)

This Petition followed. Respondents have answered the Petition on the merits.

II. 28 U.S.C. § 2254

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254 now provides, in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an

> application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
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> With respect to any claim adjudicated on the merits in state court proceedings, the writ shall not issue unless the adjudication of the claim
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determinated by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or "if the state court confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from [the Court's] precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000) (O'Connor, J., for the Court, Part II). A state court decision "involve[s] an unreasonable application" of federal law "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," and may involve an "unreasonable application" of federal law "if the state court

either unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply," (although the Supreme Court expressly declined to decide the latter). Id. at 407-09. To be an "unreasonable application" of clearly established federal law, the state court's application must be objectively unreasonable. Id. at 409. In determining whether the state court's application of Supreme Court precedent was objectively unreasonable, a habeas court may consider the decisions of inferior federal courts. Matteo v. Superintendent, 171 F.3d 877, 890 (3d Cir. 1999).

Even a summary adjudication by the state court on the merits of a claim is entitled to § 2254(d) deference. Chadwick v. Janecka, 302 F.3d 107, 116 (3d Cir. 2002) (citing Weeks v. Angelone, 528 U.S. 225, 237 (2000)). With respect to claims presented to, but unadjudicated by, the state courts, however, a federal court may exercise pre-AEDPA independent judgment. See Hameen v. State of Delaware, 212 F.3d 226, 248 (3d Cir. 2000), cert. denied, 532 U.S. 924 (2001); Purnell v. Hendricks, 2000 WL 1523144, *6 n.4 (D.N.J. 2000). See also Schoenberger v. Russell, 290 F.3d 831, 842 (6th Cir. 2002) (Moore, J., concurring) (and cases discussed therein).

The deference required by § 2254(d) applies without regard to whether the state court cites to Supreme Court or other

federal caselaw, "as long as the reasoning of the state court does not contradict relevant Supreme Court precedent." Priester v. Vaughn, 382 F.3d 394, 398 (3d Cir. 2004) (citing Early v. Packer, 537 U.S. 3 (2002); Woodford v. Visciotti, 537 U.S. 19 (2002)).

Although a petition for writ of habeas corpus may not be granted if the Petitioner has failed to exhaust his remedies in state court, a petition may be denied on the merits notwithstanding the petitioner's failure to exhaust his state court remedies. See 28 U.S.C. § 2254(b)(2); Lambert v. Blackwell, 387 F.3d 210, 260 n.42 (3d Cir. 2004); Lewis v. Pinchak, 348 F.3d 355, 357 (3d Cir. 2003).

Finally, a pro se pleading is held to less stringent standards than more formal pleadings drafted by lawyers. Estelle v. Gamble, 429 U.S. 97, 106 (1976); Haines v. Kerner, 404 U.S. 519, 520 (1972). A pro se habeas petition and any supporting submissions must be construed liberally and with a measure of tolerance. See Royce v. Hahn, 151 F.3d 116, 118 (3d Cir. 1998); Lewis v. Attorney General, 878 F.2d 714, 721-22 (3d Cir. 1989); United States v. Brierley, 414 F.2d 552, 555 (3d Cir. 1969), cert. denied, 399 U.S. 912 (1970).

III. ANALYSIS

A. Speedy Trial

Plaintiff contends that he was deprived of his state and federal rights to a speedy trial due to a gap of more than three years between his arrest and the beginning of his trial.[2]

The Appellate Division rejected Petitioner's claim that his rights to a speedy trial were violated.

> Defendant contends that his convictions must be vacated because his federal and state rights to a speedy trial were violated. Citing the four criteria established by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972), defendant asserts that a speedy trial violation occurred here because: (1) there was a period of three years and five months between his arrest and the commencement of the trial; (2) the State unduly delayed in presenting the gathered evidence to the State Lab, and there was no sound reason for the delay; (3) defendant asserted his speedy trial right at his arraignment in December 1994 and then again in a motion in March 1995; and (4) the delay prejudiced defendant through oppressive pretrial incarceration, causing defendant anxiety and concern, and impaired his defense because his incarceration prevented him from gathering evidence and contacting witnesses.
>
> The United States Supreme Court has formulated a four-part test to analyze a defendant's Sixth-Amendment speedy trial claim by evaluating these factors: (1) the length of the delay; (2) the reasons for the delay: (3) whether the defendant asserted his right; and (4) the

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[2] It is well-established that the violation of a right created by state law is not cognizable as a basis for federal habeas relief. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.'" (quoting Lewis v. Jeffers, 497 U.S. 764, 680 (1990))). Thus, Petitioner is not entitled to relief based upon any violation of his state law right to a speedy trial.

prejudice to the defendant caused by the delay. Barker, 407 U.S. at 530, 92 S.Ct. at 2192, 33 L.Ed.2d at 116. These factors were adopted by the New Jersey Supreme Court in State v. Szima, 70 N.J. 196, 200-02, cert. denied, 429 U.S. 896, 97 S.Ct. 259, 50 L.Ed.2d 180 (1976). None of these enumerated factors is singularly regarded as "either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. Rather, they [are] to be treated as related factors to be considered with such other circumstances as may be relevant." Id. at 201; See also Barker, 407 U.S. at 533, 92 S.Ct. at 2193, 33 L.Ed.2d at 118. Therefore, the "application of a balancing of interests test must be on an ad hoc basis and necessarily involves subjective reaction to the balancing of the circumstances." Szima, 70 N.J. at 201.

Applying the first Barker factor to the present case, there is no question that the period from defendant's arrest on November 4, 1993, to the commencement of trial on April 29, 1997, was a delay of sufficient length to trigger inquiry about defendant's right to a speedy trial. Cases involving delays of lesser duration have been found violative of speedy trial rights. See e.g., Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967) (finding that an eighteen-month delay violated defendant's right to a speedy trial).

Regarding the second Barker factor, here, the record shows that there were many delays in moving the case to trial, some of which were attributable to defendant, some to the State and others to the court system. Defendant's change of counsel delayed the case in April and May 1995, and his counsel's non-attendance and requests for adjournment further delayed matters in October 1995, May 1996, September 1996 and February 1997. The prosecutor made only one adjournment request, postponing the trial for three weeks in April 1997. Defendant makes much of a one-year delay caused by the State lab's request for hair, blood and saliva samples from defendant. Defendant, however, was involved in causing this delay, because he apparently refused to give the samples and required the State to file a motion. The motion was filed in August 1994, but the record does not indicate when the motion was granted, and the samples were not actually collected

until June 1995. This delay occurred during the period when defendant was in the midst of obtaining new counsel, however, so it can be assumed that this, in addition to defendant's intervening motions and appeal of one motion, contributed to the delay. Reviewing the record of delays on the whole, "although a substantial amount of time lapsed between defendant's arrest and the beginning of the trial, there is no indication that the prosecution intentionally delayed the proceedings to gain an unfair, tactical advantage." State v. Long, 119 N.J. 439, 471 (1990).

In applying the third Barker factor, there is no doubt that defendant asserted his right to a speedy trial. Finally, the fourth Barker factor looks at prejudice to the defendant. Here defendant broadly states that the delay prejudiced him through oppressive pretrial incarceration, causing him anxiety and concern, and by impairing his defense because his incarceration prevented him from gathering evidence and contacting witnesses. These were the considerations listed by the Court in Barker, 407 U.S. at 532, 92 S.Ct. at 2193, 33 L.Ed.2d at 118, where the Court recognized impairment of the defense as the most serious concern.

Here, however, defendant does not demonstrate any way in which his defense was impaired, and none is obvious from the presentation of the case. Given the isolated and remote areas where defendant committed the crimes, there would be no expectation of additional fact witnesses that he could gather, and there was no assertion that there had been fact witnesses who died or had faded memories. Defendant did not claim an alibi, so there was no need for alibi witnesses, and he had an expert witness to refute the State's expert testimony regarding the physical evidence. Thus, although defendant was incarcerated for that entire pretrial period, no prejudice to the preparation of his defense is evident.

Similarly, defendant did not articulate other specific areas of prejudice. He was unemployed, so his incarceration did not affect any particular position, although it did affect his ability to obtain a job during the pretrial period and his personal liberty.

> In sum, balancing all of these factors, defendant's own responsibility for the delay in the beginning of his trial and the lack of any prejudice to his defense, militate against the conclusion that the State denied defendant his right to a speedy trial. We conclude that even though the delay between defendant's arrest and the beginning of the trial was drawn out, under these circumstances, the delay did not constitute a violation of defendant's right to a speedy trial.

(RE10, Opinion of Superior Court, Appellate Division, at 9-13.)

The Sixth Amendment provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ... ." U.S. Const. amend. VI. The right to a speedy trial is "fundamental" and is imposed on the states by the Due Process Clause of the Fourteenth Amendment. Kloper v. North Carolina, 386 U.S. 213, 223 (1967). See also Barker v. Wingo, 407 U.S. 514 (1972). In Barker, the Supreme Court set forth four factors to be weighed and balanced to determine whether the Sixth Amendment's guarantee of a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) whether, in due course, the defendant asserted his right to a speedy trial; and (4) the prejudice to the defendant. See id. at 530; see also United States v. Dent, 149 F.3d 180, 184 (3d Cir. 1998), cert. denied, Dent v. United States, 525 U.S. 1085 (1999).

Here, the Appellate Division correctly identified the applicable Supreme Court precedent. The decision of the Appellate Division is neither contrary to nor an unreasonable

application of the governing federal law, nor did it result in an unreasonable determination of fact in light of the evidence presented.[3] Petitioner is not entitled to relief on this claim.

B. Prosecutorial Misconduct

Petitioner contends that the prosecutor overstepped the bounds of fair advocacy in his closing statement to the jury. The Appellate Division rejected on direct appeal Petitioner's claim of prosecutorial misconduct.

> Defendant contends that the prosecutor's comments during his closing argument overstepped the bounds of fair advocacy and deprived defendant of the right to a fair trial. Defendant asserts that through the improper comments, the prosecutor attempted to seek sympathy from the jury for M.S., and also attempted to suggest that the jury convict "if they were viscerally appalled by the crimes" even if there was insufficient evidence against defendant. Defendant noted that the trial judge reprimanded the prosecutor for his remarks, but defendant asserts that this was not enough, because the judge gave no curative instruction.
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> Defendant argues that three parts of the prosecutor's closing argument was improper. In the first, referring to M.S.'s testimony, the prosecutor said:
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> > Let me say this to you, a very interesting thing happened when she couldn't identify the defendant initially, did you see that demeanor?

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[3] In his Reply and Supplemental Documents [Docket Entries Nos. 14, 15], Petitioner argues that more than a year of delay was attributable to the prosecutor's failure to provide defense counsel with discovery. It does not appear that this argument was made in Petitioner's direct appeal. In any event, it does not alter the outcome of the Barker balancing test. Even if some or all of the delay during that period were attributable to the state, the complete lack of impairment to Petitioner's defense outweighs the impact of that delay.

> Did she strike you as the type of actress capable of receiving an academy award? Or, perhaps she failed to read the manual on how rape victims are supposed to act, how rape victims are supposed to control the amount of seminal material left by their attacker, how they're supposed to control the amount of hair, the length of hair, the location of the hair that their attacker leaves behind. No, the manipulator only cold have done that, and we're going to talk about those things that he did [so as] not to leave evidence behind, not to be seen, not to be identified.

Defendant next highlights comments regarding defendant's actions where the prosecutor stated:

> [defendant is] going to do things that are going to prevent evidence from being collected, he's going to instill fear in this 36 year old woman filled with anxiety ... and he is going to instill such fear in her that she is not going to be able to claw at him, make a scratch on his face or pull his hair. And she knows the repercussions of what Mr. tough guy is going to do if she does any of those things, he's going to punch her again.

Finally, in what defendant characterizes as the prosecutor's most egregious comments, the prosecutor continued:

> Let me- let me turn the tables on this for one second, let's assume arguendo for purposes of this comparison that [M.S.], because of the fear and-fear of reprisal of this man didn't immediately report it to the police but went home and, as a rape victim, showered, changed and attempted to close the door on this incident, but she couldn't, and at some future point she reports the incident to the police. Does that mean because she reported it a week or two later that this man should be allowed back into society with no repercussions or no responsibility on his part? He is the only one who bears responsibility in this case for what happened ...
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> And isn't she, as an entitled citizen of this community where she's lived, perhaps, even longer than this man has been born, she can't do that?

> Well, ... I will tell you what sir, you want [M.S.'s] car? You can have it, you can have it right now. You could have had it back then. Can you give her her dignity back, please, can you do that?

After this statement the trial judge called the prosecutor to the side bar and said:

> Stop addressing the defendant directly, address your comments to the jury, stop this inflammatory oratory, comment on the evidence. That's what you need to do, Mr. Valentin, don't make me consider a mistrial at the end of this thing, we're too close now, direct your comments to the jury, comment on the evidence. That's all.

The trial judge did not give a curative instruction at that point, but the prosecutor apparently heeded the trial judge's admonition. Defense counsel did not make any objection regarding any of the prosecutor's comments, nor did she object to the lack of a curative instruction.

"Ordinarily a defendant will not be heard to claim prejudice if defense counsel does not interpose a timely and proper objection to the improper remarks." State v. Bogen, 13 N.J. 137, 141-42, cert. denied, 346 U.S. 825, 74 S.Ct. 44, 98 L.Ed. 350 (1953) (citation omitted). If a timely objection is made, the trial judge has the opportunity to "rectify the situation or to reduce the impact of such comment by taking corrective action." State v. Bucanis, 26 N.J. 45, 57, cert. denied, 357 U.S. 910, 78 S.Ct. 1157, 2 L.Ed.2d 1160 (1958). Where, as here, no timely objection was made, the court must determine whether the comment was "clearly capable of producing an unjust result." R. 2:10-2. The possibility of such an unjust result must be "'one sufficient to raise a reasonable doubt as to whether the error led the jury to the result it otherwise might not have reached.'" State v. Benedetto, 120 N.J. 250, 261 (1990) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). Here, the issue is whether there is a sufficient possibility that the prosecutor's statements led the jury to find defendant guilty, where it otherwise might have found him not guilty.

> No such conclusion can be drawn here, even though the prosecutor's comments about M.S. getting her dignity back were improper. The comments did not rise to the level of "clearly and unmistakenly improper" language that "must have resulted in substantial prejudice to defendant's fundamental right to have a jury fairly assess the persuasiveness of his case." State v. Darrian, 255 N.J. Super. 435, 453 (App. Div.), certif. denied, 130 N.J. 13 (1992).
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> Moreover, the prosecutor's comments with respect to M.S.'s right to go home before contacting the police was in response to comments by defense counsel suggesting that perhaps the offenses never occurred because there was an absence of spermatozoa.
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> There was sufficient evidence to support defendant's convictions and the trial judge's charge adequately explained to the jury how it was to consider the evidence before it. Accordingly, the prosecutor's comments did not result in substantial prejudice to defendant's right to have the jury fairly consider the case.

(RE10, Opinion of Superior Court, Appellate Division, at 17-20.)

The U.S. Supreme Court has recognized the obligation of a prosecutor to conduct a criminal prosecution with propriety and fairness.

> He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. ... Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger v. United States, 295 U.S. 78, 88 (1935). "The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone. Prosecutors sometime breach their

duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence." United States v. Young, 470 U.S. 1, 7 (1985).

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Id. at 18.

Under U.S. Supreme Court precedent, where a prosecutor's opening or closing remarks are challenged in habeas, "[t]he relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). In evaluating the likely effect of improper comments, a court may consider whether the improper comments were invited by or responsive to prior comments by opposing counsel. Darden, 477 U.S. at 181-82. Thus, "Supreme Court precedent counsels that the reviewing court must examine the prosecutor's offensive actions in context and in light of the entire trial, assessing the severity of the conduct, the effect of the curative

instructions, and the quantum of evidence against the defendant." Moore v. Morton, 255 F.3d 95, 107 (3d Cir. 2001).

Here, although the Appellate Division relied on state law to decide this issue, its reasoning does not contradict the relevant Supreme Court precedent. The Appellate Division considered and rejected the claim that the actions of the prosecutor deprived Petitioner of his right to fundamental fairness, finding certain remarks justified based upon their nature as rebuttal to remarks made by defense counsel. Petitioner is not entitled to relief on this claim.

C. Jury Instructions

Plaintiff contends that the jury instructions on identification were not tailored to the facts of his case and he challenges the failure to instruct on cross-racial identification.

The Appellate Division rejected Petitioner's jury instructions claims.

> Defendant asserts that he was denied a fair trial by the judge's failure to offer a cross-racial identification charge because M.S. is Filipino and defendant is African-American. Defendant's counsel did not request a cross-racial identification charge, as contemplated by State v. Cromedy, 158 N.J. 112 (1999). A cross-racial identification charge is required "only when ... identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability." Id. at 132. Here, there are many corroborating facts, which remove this case from the category of cases where a cross-racial identification charge would be appropriate pursuant to

> Cromedy. Those facts include: the tattoo on defendant's arm, consistent with M.S.'s description; the clothes seized from defendant's apartment that matched those that M.S. described; the hair and fiber evidence that tended to link defendant to the crime scene; defendant's own behavior in walking around and peering into M.S.'s car where it was parked near defendant's apartment; and the presence of M.S.'s car keys in defendant's jacket pocket. All of this corroborated M.S.'s identification. None of this evidence pointed to any other person. Thus, Cromedy does not require a cross-racial identification charge under these circumstances.
>
> Although defendant alleged at trial that M.S. stated to an investigator that "all blacks look alike," this allegation was contested by M.S. The Cromedy decision did not address a circumstance where a witness alleged that the victim made such a statement, but even here, there is no showing that the absence of a cross-racial identification charge would lead to plain error. The jury was presented with the evidence of M.S.'s alleged statement, and M.S.'s denial of having made the statement. In closing arguments, defense counsel methodically outlined the difficulty M.S. would have had in viewing her assailant in the dark and during the assault, the unfairness of the out-of-court identification because defendant was the only black man in the room, M.S.'s inability to identify defendant at first in the courtroom, and her belated identification that occurred only after she breached a court order and spoke with the prosecutor. The jury therefore knew that identification of defendant was a key issue, and they knew that M.S. had allegedly said she could not distinguish black people from one another. In this circumstance, the jury did not need any additional instruction on the problems associated with cross-racial identification. That issue was clearly before the jury. As such the identification charge here was no "clearly capable of producing an unjust result." R. 2:10-2.

(RE10, Opinion of Superior Court, Appellate Division, at 14-15.)

Generally, a jury instruction that is inconsistent with state law does not merit federal habeas relief. Where a federal

habeas petitioner challenges jury instructions given in a state criminal proceeding,

> [t]he only question for us is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." It is well established that the instruction "may not be judged in artificial isolation," but must be considered in the context of the instructions as a whole and the trial record. In addition, in reviewing an ambiguous instruction ..., we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution. And we also bear in mind our previous admonition that we "have defined the category of infractions that violate 'fundamental fairness' very narrowly." "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation."

Estelle v. McGuire, 502 U.S. 62, 72-73 (1991) (citations omitted). Thus, the Due Process Clause is violated only where "the erroneous instructions have operated to lift the burden of proof on an essential element of an offense as defined by state law." Smith v. Horn, 120 F.3d 400, 416 (1997). See also In re Winship, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); Sandstrom v. Montana, 442 U.S. 510, 523 (1979) (jury instructions that suggest a jury may convict without proving each element of a crime beyond a reasonable doubt violate the constitutional rights of the accused).

Where such a constitutional error has occurred, it generally is subject to "harmless error" analysis. Smith v. Horn, 120 F.3d at 416-17; Neder v. United States, 527 U.S. 1, 8-11 (1999). "[I]f the [federal habeas] court concludes from the record that the error had a 'substantial and injurious effect or influence' on the verdict, or if it is in 'grave doubt' whether that is so, the error cannot be deemed harmless." Id. at 418 (citing California v. Roy, 519 U.S. 2, 5 (1996)). In evaluating a challenged instruction,

> a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.

Middleton v. McNeil, 541 U.S. 433, 437 (2004) (internal quotations and citations omitted).

However, a jury instruction that "reduce[s] the level of proof necessary for the Government to carry its burden [of proof beyond a reasonable doubt] is plainly inconsistent with the constitutionally rooted presumption of innocence." Cool v. United States, 409 U.S. 100, 104 (1972). "[T]rial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." Victor v. Nebraska, 511 U.S. 1, 22 (1994); see also Cage v. Louisiana, 498 U.S. 39, 41 (1990). As the Supreme Court explained in Victor,

> so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.

Victor, 511 U.S. at 6 (citations and internal quotation marks omitted).

"[A] misdescription of the burden of proof ... vitiates all the jury's findings. Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) (emphasis in original). Such an error is considered structural and thus is not subject to harmless error review. See id. at 280-82. But see Neder v. United States, 527 U.S. 1, 8-11 (1999) (applying harmless-error analysis where jury was not instructed on an element of an offense).

Here, the failure to give identification instructions tailored to the facts of this case and to the issue of cross-racial identification did nothing "to lift the burden of proof on an essential element of an offense." Moreover, there was substantial identification evidence other than the testimony of the victim, including hair and fiber evidence, clothing matching the victim's description of her assailant's clothing, the tattoo, Petitioner's suspicious behavior at the victim's parked car, and the location of the keys to the victim's car in Petitioner's jacket. Weaknesses in the identification evidence were amply demonstrated by defense counsel. Petitioner was not deprived of

a fair trial by the instructions on identification. Petitioner is not entitled to relief on this claim.

D. Ineffective Assistance of Counsel

Petitioner alleges that he was deprived of effective assistance of trial counsel, in violation of his rights under the Sixth Amendment. Specifically, Petitioner challenges trial counsel's failures (1) to request a hearing under United States v. Wade, 388 U.S. 218 (1967), (2) to request a voir dire of the victim regarding the violation of the court's sequestration order, (3) to thoroughly cross-examine the victim and Investigator Quirk on the issue of identification and the victim's violation of the court's sequestration order, (4) to aggressively oppose the prosecutor's request that petitioner display his right upper arm, with the tattoo, to the jury, and (5) to properly and thoroughly prepare the claim of racial bias through Investigator Robbins.

On direct appeal, the Appellate Division rejected Petitioner's claim that his counsel was ineffective for failing to request a Wade hearing.

> Next, defendant asserts that his counsel was ineffective for failing to request a Wade[fn1] haring to test the admissibility of M.S.'s out-of-court identification. Our review of the record convinces us that any such hearing would have resulted in the admissibility of the out-of-court identification. M.S. had ample opportunity to view her assailant during the approximately three hours of her ordeal. Moreover, at the conclusion of the assault, M.S. undoubtedly faced defendant when she requested her house keys. As noted

> in Neil v. Biggers, M.S. "was no casual observer, but rather the victim of one of the most personally humiliating of all crimes." 409 U.S. 188, 200, 93 S.Ct. 375, 382-83, 34 L.Ed.2d 401, 412 (1972). M.S.'s descriptions of her assailant's clothing and tattoo were detailed and accurate, and M.S. demonstrated certainty that defendant was her assailant when she saw him in police custody. Finally, it's worth noting that the identification occurred less than twenty-four hours after the assault, while her memory was fresh.
>
> [fn1] 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

(RE10, Opinion of Superior Court, Appellate Division, at 15-17.)

In his state petition for post-conviction relief, Petitioner raised the other claims of ineffective assistance of counsel raised in this Petition. The trial court rejected these claims following a non-evidentiary hearing.

> The case that is controlling has been cited Strickland v. Washington, 466 U.S. at 668, ineffective assistance of Counsel, and we know that the Petitioner has to demonstrate that Counsel's performance was deficient. That's the first prong.
>
> And the second prong is that the Petitioner must demonstrate that the deficient performance prejudiced the Defense.
>
> The Defense here or the Petitioner here say that the performance was deficient for the reasons specifically stated by Defense Counsel. The strategy of the Defense Counsel with respect to the issues that have been raised here, the identification issue, the breach of the Court's Order of Sequestration and the like, and the fact that the issue regarding the description and the description by the victim that she gave to the Investigator of the fact that she said it was difficult for her to identify the Defendant because all Blacks look alike, and because he had a flat nose, those issues we see, we see what the State says was the strategy of the Defense Counsel as the State perceives it to be at the particular time of the trial.

And also, I would consider perhaps much more in this case telling, the second prong of Strickland, as to whether or not any deficiency on the part of Counsel was so serious that it did result in prejudicing the Defendant, such that, a fair trial was not conducted.

Now the facts of this case which I know both Counsel are aware of very much because I'm mentioning them with respect to the second prong are that: [then followed a detailed recitation of the facts of the crime and the evidence presented at trial.]

...

The Court adopts those facts here as this Court's own findings with respect to the case here with respect to this question that I must delve into regarding the two-prong aspect of Strickland.

The Court in looking at the entire situation with respect to the issue of whether or not even an evidentiary hearing should be conducted here would say, no. I do not find when I look at the overwhelming evidence that was before the Court, the jury in this particular case, that the three issues that have been raised here to really highlight the ineffective assistance of Counsel claim against the trial defense lawyer, that Counsel's deficient performance, Counsel's performance was deficient basically for the reason cited by the State.

But I say even more importantly, if there was any deficiency on the part of Defense Counsel, certainly, it was not prejudicial to this Defendant as the evidence in this case was overwhelming.

The identification evidence which granted, permeates that in this case, there were the problems after the initial identification with respect to the victim and the breaking of the Court's Order of Sequestration and so forth, but I say almost in judging those at this juncture, that they were de minimis in comparison to the overwhelming evidence that was elicited against this Defendant at trial. That they pale by comparison.

And so, the Court does deny the motion for those reasons specifically, ...

(RE26 at 19-25.) The Appellate Division rejected these claims summarily.

> Defendant contends that his trial counsel's ineffectiveness violated his constitutional right to effective representation under both the Sixth Amendment to the United States Constitution and Article I, Paragraph 10, of the New Jersey Constitution. To prevail, defendant must demonstrate that: (a) "counsel's performance was deficient," and (b) "there exists 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Preciose, 129 N.J. 451, 463-64 (1992) (citation omitted).
>
> Under this test, defendant's claim must fail.

(RE4, Opinion of Superior Court, Appellate Division, at 3-4.)

The Counsel Clause of the Sixth Amendment provides that a criminal defendant "shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The right to counsel is "the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (emphasis added).

To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show both that his counsel's performance fell below an objective standard of reasonable professional assistance and that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Strickland at 694.

Counsel's errors must have been "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695.

The performance and prejudice prongs of Strickland may be addressed in either order, and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." Id. at 697.

There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. As a general matter, strategic choices made by counsel after a thorough investigation of the facts and law are "virtually unchallengeable," though strategic choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690-91. If counsel has been deficient in any way, however, the habeas court must determine whether the cumulative effect of counsel's errors prejudiced the defendant within the meaning of Strickland. See Berryman v. Morton, 100 F.3d 1089, 1101-02 (3d Cir. 1996).

In United States v. Wade, the Supreme Court held that a pre-trial line-up is a critical stage of a prosecution at which the suspect is entitled to counsel; where counsel is absent, the accused is entitled to a hearing to determine whether the identification procedure was so tainted that a subsequent in-court identification should be suppressed. An accused is entitled to due process protection against the introduction of evidence of, or tainted by, unreliable identifications elicited through unnecessarily suggestive identification procedures. See generally Manson v. Brathwaite, 432 U.S. 98 (1977) and cases cited therein.

> [R]eliability is the linchpin in determining the admissibility of identification testimony ... . The factors to be considered ... include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Manson, 432 U.S. at 114. See also Simmons v. United States, 390 U.S. 377 (1968) (due process prohibits in-court identification if pre-trial identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification").

An "on-scene" or "show-up" identification is one in which the suspect is apprehended at or near the scene and is returned to it immediately where the victim/witness may make an

identification or one in which only one suspect is shown to the victim/witness at a later time. In Neil v. Biggers, 409 U.S. 188, 198 (1972), the Supreme Court held that the "admission of evidence of a showup without more does not violate due process."

Although a show-up identification generally is considered more suggestive than a line-up, see Stovall v. Denno, 388 U.S. 293, 302 (1967), overruled on other grounds, Griffith v. Kentucky, 479 U.S. 314 (1987), a number of Circuit Courts of Appeals, including the Third Circuit Court of Appeals, have held show-up identifications admissible.

> Immediate show-ups can serve ... important interests. For example, show-ups allow identification before the suspect has altered his appearance and while the witness' memory is fresh. ... In our view, such considerations will justify a show-up in a limited number of circumstances, such as where the police apprehend a person immediately after the crime and in close proximity to the scene.

United States v. Funches, 84 F.3d 249, 254 (7th Cir. 1996) (citations omitted). See also U.S. v. Watson, 76 F.3d 4, 6 (1st Cir.), cert. denied, 517 U.S. 1239 (1996); Johnson v. Dugger, 817 F.2d 726, 729 (11th Cir. 1987); United States v. Gaines, 450 F.2d 186, 197 (3d Cir. 1971) (holding that a show-up conducted without counsel was justified by "the fact that the eye-witness might have quickly departed, and the considerations of reliability inhering in an immediate identification"), cert. denied, 405 U.S. 927 (1972).

Here, the Appellate Division correctly identified Neil v. Biggers as a relevant precedent and applied the factors enumerated in Manson to determine the reliability of the challenged identifications. The conclusion of the Appellate Division that the out-of-court identification was properly admitted, and that therefore there was no ineffective assistance of counsel in failing to challenge the identification, is neither contrary to nor an unreasonable application of binding federal precedent. Petitioner is not entitled to relief on this claim.

Neither is Petitioner entitled to relief on the other claims of ineffective assistance of counsel. Most of the other claims of ineffective assistance arise out of counsel's handling of the victim's identification of Petitioner. On direct examination, the victim testified regarding her out-of-court identification of Petitioner, but she was not able to identify Petitioner in court as the person who had kidnapped and assaulted her. (5T at 66.) At the conclusion of her direct testimony, the Court ordered her not to discuss her testimony with anybody, including the prosecutor. Prior to the commencement of cross-examination, the prosecutor advised the court that the victim had told him after her direct testimony, and in the presence of Investigator Quirk, that the man seated at counsel table was the man who committed the crimes against her. Defense counsel brought out on cross-examination that the victim had told the prosecutor and

Investigator Quirk, in violation of the Court's order, that she recognized Petitioner. (5T at 11-12.) Defense counsel also brought out the circumstances of the original out-of-court identification, in which Petitioner was alone with two white men, and that the victim was never asked to identify Petitioner from a photo array or a line-up of several men. (5T at 22-23.) Defense counsel also explored the victim's experiences with African-Americans and asked whether she had told an investigator that she was unable to distinguish the features of African-Americans. (5T at 28-29.) On re-direct, the prosecutor questioned the victim about her identification of Petitioner during the break in testimony and asked her if she could identify her assailant. The victim then identified Petitioner in court. (5T at 32-33.) In her cross-examination of Investigator Quirk, defense counsel did not ask about the victim's statement in the break during her testimony that she could identify Petitioner, which Investigator Quirk had apparently witnessed. (6T at 78-79.) Defense counsel also elicited testimony from a defense investigator that the victim had indicated that she couldn't describe her assailant because, "basically, all blacks look alike to her." (10T at 35.) On cross-examination, the defense investigator stated that he had never made a report of the victim's remarks about her ability to identify African-Americans and that the lead defense investigator had never made a report of those remarks. (10T at 44, 51.) The

victim denied making the statement. Petitioner's contention that he received ineffective assistance because of this evidence regarding the victim's identification of him is meritless. Defense counsel placed before the jury evidence of various deficiencies in the victim's identifications of Petitioner, including the show-up identification, her alleged remarks about her ability to identify African-Americans, and her violation of the trial judge's sequestration order. As the trial court found, regardless of the quality of defense counsel's preparation and questioning regarding the identification issue, Petitioner has failed to demonstrate that absent counsel's alleged errors there is a reasonable probability that the outcome would have been different. Other evidence amply demonstrates Petitioner's guilt.

Finally, Petitioner contends that counsel should have more aggressively opposed the prosecutor's request that Petitioner show the jury the tattoo on his arm. This claim is grounded in the Fifth Amendment privilege against self-incrimination. U.S. Const. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself").

> In applying the Self-Incrimination Clause of the Fifth Amendment, the Supreme Court has recognized a controlling distinction between real or physical evidence obtained from a defendant's person and that which is testimonial. The Court has upheld action by the state compelling an accused to submit to blood tests, Schmerber v. California, 1966, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908; to try on clothing, Holt v. United States, 1910, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021, and to exhibit his person for observation, United

> States v. Wade, 1967, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149. In addition, the Court has cited with approval cases holding that the privilege against self-incrimination 'offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.' United States v. Wade, supra, at 223, 87 S.Ct. at 1930, quoting from Schmerber v. California, supra, 384 U.S. at 764, 86 S.Ct. at 1826.

Mitchell v. Pinto, 438 F.2d 814, 816-17 (3d Cir. 1970) (en banc), cert. denied, 402 U.S. 961 (1971). Thus, Respondents are correct that Petitioner had no privilege to refuse to display his tattoo to the jury. See, e.g., Gardner v. Norris, 949 F.Supp. 1359, 1374 (E.D. Ark. 1996). Petitioner is not entitled to relief on this claim.

F. Cumulative Error

The Appellate Division rejected Petitioner's claim of cumulative error without discussion. (RE4.)

Even if none of Petitioner's claims on its own amounts to a constitutional violation, the "cumulative effect of the alleged errors may violate due process." United States ex rel. Sullivan v. Cuyler, 631 F.2d 14, 17 (3d Cir. 1980); see also Pursell v. Horn, 187 F.Supp.2d 260, 374 (W.D. Pa. 2002) ("That the reliability of a state criminal trial can be substantially undermined by a series of events, none of which individually amounts to a constitutional violation, is an idea that has been accepted by nearly every federal court to have addressed the

issue."). Neither the Supreme Court nor the Court of Appeals for the Third Circuit has established a standard by which a claim of cumulative error must be determined. See Pursell, 187 F.Supp.2d at 374-76 (describing three alternative approaches).

Thus, here, the decision of the Appellate Division that there was no cumulative error amounting to a due process deprivation is neither contrary to nor an unreasonable application of governing federal precedent. This Court agrees that Petitioner has failed to demonstrate cumulative error amounting to a deprivation of his right to due process. Petitioner is not entitled to relief on this claim.

G. Other Claims

In his Supplemental Memorandum of Law [Docket Entry No. 2], Petitioner presents arguments in support of claims not asserted in the Petition itself. Specifically, Petitioner alleges constitutional deprivations including (1) a deprivation of due process arising out of the failure to arraign him within 72 hours, (2) a deprivation of due process arising out of the out-of-court identification procedure employed by the police, and (3) a violation of his right to be free from cruel and unusual punishment under the Eighth Amendment. He also contends that he is entitled to an evidentiary hearing.

As noted above, these claims are not asserted in the Petition; nor was the Petition amended after Petitioner received

the notice required by Mason v. Meyers, 208 F.3d 414 (3d Cir. 2000). Respondents did not answer as to these arguments, and Petitioner did not refer to them in his Reply. Accordingly, this Court does not consider that these claims are properly a part of the Petition before the Court. To the extent the Supplemental Memorandum could be construed as amending the Petition to assert these claims, they are meritless.[4]

1. Arraignment

Petitioner contends that his due process rights were violated by the failure of the government to subject him to a timely arraignment. Petitioner contends that he was never arraigned before trial, in violation of state law, which he contends incorporates the requirements of the due process clause. The case on which Petitioner relies, Gerstein v. Pugh, 420 U.S. 103 (1975), specifically holds, however, that such a deficiency is not a grounds for invalidating a subsequent conviction.

> In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. Thus, as the Court of Appeals noted below, although a suspect who is presently

[4] Pursuant to 28 U.S.C. § 2254(b)(2), this Court may deny a petition on the merits, notwithstanding a petitioner's failure to exhaust the remedies available in state court.

> detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause.

Gerstein, 420 U.S. at 119 (citations omitted). Petitioner is not entitled to relief on this claim.

2. Out-of-Court Identification Procedure

In the context of Petitioner's claim of ineffective assistance of counsel, this Court has already determined that the decision of the Appellate Division that the out-of-court identification was admissible is neither contrary to nor an unreasonable application of federal law. Thus, this claim is meritless and this Court will not revisit the issue.

To the extent the allegation could be construed as a challenge to the subsequent in-court identification, the decision of the Appellate Division that the trial judge did not abuse his discretion in permitting the victim to identify defendant on re-direct is neither contrary to nor an unreasonable application of federal law. The same reliability factors that govern admissibility of the out-of-court identification govern admissibility of the subsequent in-court identification. Defense counsel was able to highlight for the jury factors that it could consider in determining what weight to give the identifications. To the extent there was error, it was harmless. Petitioner is not entitled to relief.

3. Eighth Amendment

Petitioner contends that his aggregate sentence of life imprisonment plus eighty years, with a 60-year parole disqualifier, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

A federal court's ability to review state sentences is limited to challenges based upon "proscribed federal grounds such as being cruel and unusual, racially or ethnically motivated, or enhanced by indigencies." See Grecco v. O'Lone, 661, F.Supp. 408, 415 (D.N.J. 1987) (citation omitted). Thus, a challenge to a state court's discretion at sentencing is not reviewable in a federal habeas proceeding unless it violates a separate federal constitutional limitation. See Pringle v. Court of Common Pleas, 744 F.2d 297, 300 (3d Cir. 1984). See also 28 U.S.C. § 2254(a); Estelle v. McGuire, 502 U.S. 62, 67 (1991); Lewis v. Jeffers, 497 U.S. 764, 780 (1990).

"The Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" Ewing v. California, 538 U.S. 11, 20 (2003) (citations omitted). The Supreme Court has identified three factors that may be relevant to a determination of whether a sentence is so disproportionate to the crime committed that it violates the Eighth Amendment: "(1) the gravity of the offense and the harshness of the penalty; (ii) the

sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Solem v. Helm, 463 U.S. 277, 292 (1983). More recently, Justice Kennedy has explained that Solem does not mandate comparative analysis within and between jurisdictions, see Harmelin v. Michigan, 501 U.S. 957, 1004-05 (Kennedy, J., concurring in part and concurring in judgment), and he has identified four principles of proportionality review--"the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors"--that "inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime," id. at 1001 (citation omitted) quoted with approval in Ewing, 538 U.S. at 23.

Here, Petitioner committed kidnapping, armed robbery, carjacking, aggravated sexual assault, and related crimes. The sentence was based in part, in addition, on Petitioner's criminal record and personal history, including a prior robbery and a prior sexual assault. He has presented no cogent argument why his sentence is unconstitutional. This Court finds that Petitioner's sentence is not "grossly disproportionate" to the

crimes he committed. Petitioner is not entitled to relief on this claim.

4. Evidentiary Hearing

Petitioner requests an evidentiary hearing.

Prior to enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. 104-132, 110 Stat. 1217 (April 24, 1996), the Supreme Court held that "where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew." Townsend v. Sain, 372 U.S. 293, 312 (1963). Indeed, in certain circumstances, an evidentiary hearing was mandatory.

> Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.
>
> ...
>
> [A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 312-13. The Supreme Court later refined this standard with respect to the fifth circumstance enumerated in Townsend, requiring a prisoner to "show cause for his failure to develop the facts in the state-court proceedings and actual prejudice resulting from that failure," but not otherwise curtailing the Townsend list. Keeney v. Tamayo-Reyes, 504 U.S. 1, 11 (1992). Keeney's threshold standard of diligence was codified by AEDPA in the opening clause of new 28 U.S.C. § 2254(e)(2). Williams v. Taylor, 529 U.S. 420 (2000).

Title 28 Section 2254(e) curtails the circumstances under which a District Court may grant an evidentiary hearing. It provides:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-
>
> (A) the claim relies on-
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no

> reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e).

Thus, if a prisoner fails to develop the factual basis of a claim in State court proceedings, through some lack of diligence or greater fault attributable to the prisoner or the prisoner's counsel, an evidentiary hearing cannot be granted unless the prisoner's case meets the other conditions of § 2254(e)(2). Williams, 529 U.S. at 429-37. Conversely, where the facts have not been developed in State court proceedings through no fault of the prisoner or the prisoner's counsel, the prisoner is "excused from showing compliance with the balance of the subsection's requirements." Id. at 437.

> However, even if a new evidentiary hearing is permitted under AEDPA--when it is solely the state's fault that the habeas factual record is incomplete--AEDPA, unlike Townsend and Keeney, does not require that such a hearing beheld. Instead, federal courts have discretion to grant a hearing or not. In exercising that discretion, courts focus on whether a new evidentiary hearing would be meaningful, in that a new hearing would have the potential to advance the petitioner's claim.

Campbell v. Vaughn, 209 F.3d 280, 287 (3d Cir. 2000).

Finally, § 2254(e)(2)'s introductory language "does not preclude federal hearings on excuses for procedural default at the state level." Cristin v. Brennan, 281 F.3d 404, 413 (3d Cir. 2002).

Although Petitioner requests an evidentiary hearing, he fails to identify any deficiency in the record or any manner in which an evidentiary hearing would advance any of his claims. This Court finds no basis on which an evidentiary hearing would be meaningful. The request for an evidentiary hearing is denied.

IV. CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c), unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken from a final order in a proceeding under 28 U.S.C. § 2254. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

Petitioner has failed to make a substantial showing of the denial of a constitutional right. No certificate of appealability shall issue.

V. CONCLUSION

For the reasons set forth above, the Petition must be denied. An appropriate order follows.

/s/ Susan D. Wigenton
United States District Judge

Dated: **APRIL 27, 2007**